

IN RE AMENDED MOTION FOR DECLARATORY
JUDGMENT OF GOOGLE INC.'S FIRST
AMENDMENT RIGHT TO PUBLISH
INFORMATION ABOUT FISA ORDERS

**AMENDED MOTION FOR DECLARATORY JUDGMENT OF
GOOGLE INC.'S FIRST AMENDMENT RIGHT TO
PUBLISH AGGREGATE INFORMATION ABOUT FISA ORDERS**

I. FACTUAL BACKGROUND

² The parties are filing a proposed scheduling order for briefing separate from this amended motion.

requests it receives from government agencies around the world for the production of users' information and/or communications. Google publishes a Transparency Report conveying this information in aggregate form, available at <http://www.google.com/transparencyreport/userdatarequests/>. In 2013, for the first time, Google included in its Transparency Report the number of National Security Letters ("NSLs") it receives and the number of users and accounts specified in those NSLs, within a range and on an annual basis. The Federal Bureau of Investigation confirmed in writing that Google could so, and to Google's knowledge, no declassification of any such information was necessary.

On June 6, 2013, *The Guardian* newspaper published a story mischaracterizing the scope and nature of Google's receipt of and compliance with foreign intelligence surveillance requests. In particular, the story falsely alleged that Google provides the U.S. government with "direct access" to its systems, allowing the government unfettered access to the records and communications of millions of users. The story is available at <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>. *The Washington Post* also published a misleading story that day, alleging that the U.S. government is "tapping directly into" Google's central servers in order to surreptitiously obtain user records and communications. The story is available at http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

On June 7, 2013, Google Chief Executive Officer Larry Page and Chief Legal Officer David Drummond posted a blog entry that responded to these allegations as well as they could given the constraints imposed by the government's position that even general information about Google's receipt of and response to foreign intelligence surveillance orders, if any, cannot be

disclosed. Google clarified that the government does not have direct access to Google's servers, that Google provides information to the U.S. and other governments only in accordance with the law, and that Google carefully reviews each government request and complies only if the requests appear proper and lawful. The blog post is available at <http://googleblog.blogspot.com/2013/06/what.html>. Notwithstanding Google's complete denial, the revelations about the scope of NSA activities, and false or misleading stories about Google's alleged involvement in such activities, have continued unabated and continue to cause substantial harm to Google's reputation and business. For example, on August 23, 2013, major news outlets carried a story under the completely misleading banner "NSA Paid Google, Microsoft, Others Millions for Prism Aid." See e.g., <http://gizmodo.com/confirmed-nsa-paid-google-microsoft-others-millions-1188615332>.

In light of the intense public interest generated by *The Guardian's* and *Post's* erroneous articles, and others that have followed them, Google seeks to increase its transparency with users and the public regarding its receipt of national security requests, if any. On June 11, 2013, Google requested that the Department of Justice and the Federal Bureau of Investigation permit Google to publish certain aggregate numbers about its receipt of national security requests, as further described below. The Department of Justice and the FBI have not classified that information. Nonetheless, the Department of Justice and FBI maintain their position that publication of such aggregate numbers is unlawful. Accordingly, on June 18, 2013, Google petitioned this Court for a declaratory judgment that it could publish two aggregate unclassified numbers: (1) the total number of FISA requests it receives, if any, and (2) the total number of users or accounts encompassed within such requests.

While Google's motion was pending, Google engaged in good faith negotiations with the Department of Justice and other agencies in an effort to reach consensus on the level of granularity that would provide the transparency Google wants while according due consideration to the government's national security concerns. This Court approved six extensions of the time for the government to respond to Google's motion in order to permit the negotiations to continue. Against the backdrop of these negotiations, on July 18, 2013, Google and dozens of other companies and organizations wrote President Obama and congressional leadership, seeking more granularity in the reporting of national security information by government agencies and service providers. Regrettably, the parties reached an impasse and mutually agreed to ask this Court to stay the proceedings to permit Google to amend its motion to seek the level of transparency it believes appropriate in the public interest and the interests of its users. The court granted the stay on September 4, 2013, and ordered amended motions be filed by September 9, 2013.

On August 29, 2013, the Director of National Intelligence determined "in the interest of increased transparency" to "publicly release, on an annual basis, aggregate information concerning compulsory legal process under certain national security authorities." *See* Statement of Director of National Intelligence at <http://icontherecord.tumblr.com/post/59719173750/dni-clapper-directs-annual-release-of-information>. Specifically, the DNI stated that the intelligence community "would release the total number of orders issued during the prior twelve-month period, and the number of targets affected by these orders." Encompassed within the statistical reporting would be the following FISA authorities:

- FISA orders based on probable cause (Titles I and III of FISA, and sections 703 and 704);
- Section 702 of FISA;

- FISA Business Records (Title V of FISA);
- FISA Pen Register/Trap and Trace (Title IV of FISA); and
- NSLs issued pursuant to 12 U.S.C. § 3414(a)(5), 15 U.S.C. §§ 1681u(a) and (b), 15 U.S.C. § 1681v, and 18 U.S.C. § 2709.

While Google commends the proposed publication of aggregate numbers across all national security process recipients as a step in the right direction, the effort falls short of achieving transparency meaningful to the public and to Google's users. It fails to inform them of the true extent of demands placed on Google by the government and in any event, such publication is not a replacement for Google's right to speak truthfully about the process it receives.

Google's reputation and business has been and continues to be harmed by the false or misleading reports in the media, and Google's users are concerned by the allegations. Google must respond to such claims with more than generalities. Moreover, these are matters of significant weight and importance, and transparency is critical to advancing public debate in a thoughtful and democratic manner.

II. LEGAL BACKGROUND

The First Amendment prohibits the government from "abridging the freedom of speech." U.S. CONST. amend. I. It requires that courts give especially searching scrutiny to government action—like that here—that operates as a prior restraint on the publication of information. *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"). As the Second Circuit has noted:

A judicial order forbidding certain communications when issued in advance of the time that such communications are to occur is generally regarded as a prior restraint, and is the most serious and least tolerable infringement on First

Amendment rights. Any prior restraint on expression comes to [a court] with a heavy presumption against its constitutional validity, and carries a heavy burden of showing a justification.

Doe v. Mukasey, 549 F.3d 861, 871 (2d Cir. 2009) (internal quotations and citations omitted).

The presumption against suppression, and the burden of overcoming it, are all the heavier where, as here, the desired expression relates to political and social issues of public interest. As the Supreme Court observed:

The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. [S]peech concerning public affairs is more than self expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145 (1983) (internal quotations and citations omitted).

Despite the First Amendment's strong presumption against prior restraint, particularly of expression regarding matters of deep and enduring public interest, the government seeks to prohibit Google from disclosing aggregate statistics regarding its receipt of national security legal process. The Government has identified no statute or regulation that prohibits such disclosure, and it is not appropriate for this Court to undertake the essentially legislative function of creating such a prohibition. In any event, even if such a statute or regulation existed, the government would have to show, at a minimum, that its application to the information at issue here was narrowly tailored to a compelling governmental interest that could overcome the presumption against prior restraint. No such showing can be made here, especially when the government itself has proposed to disclose actual numbers of foreign intelligence requests.

III. ENTITLEMENT TO RELIEF

Google is a “communications carrier . . . or other specified person” subject to orders by this Court to assist the government in conducting electronic surveillance or other foreign intelligence collection activities pursuant to FISA, 50 U.S.C. §§ 1801-1881g. Google seeks to be transparent regarding FISA requests that may be or have been served upon it, if any, and to respond to false or misleading statements about the scope of its compelled disclosure under national security authorities.

In particular, Google seeks a declaratory judgment that Google has a right under the First Amendment to publish, and that no applicable law or regulation prohibits Google from publishing, the total number of compulsory requests it receives under various national security authorities and the total number of users or accounts encompassed within such requests. To be clear, Google is not proposing to disclose the targets or substance of such requests, nor is it seeking the right to disclose any particular order as it is received. Instead, Google would report the aggregate number of active requests in each of the specified categories during the prior six months—the very same categories as proposed by the DNI and noted above—and the total aggregate number of users or accounts encompassed by each category of request..

Google would publish the data as part of its regular Transparency Report. Google would have a Frequently Asked Questions (“FAQ”) section that would describe the statutory FISA authorities themselves. And as is the case with regard to its handling of requests under criminal investigative authorities, Google’s internal processes for FISA requests would be reviewed by an independent third-party assessor.

This Court has the power, pursuant to a rule or inherent in its own authority, to declare that a provider may disclose aggregate statistics concerning the requests it receives for each of the specified categories of national security authorities and that such publication is protected by the First Amendment and is not classified or subject to any other legal limitation on disclosure. Accordingly, Google respectfully requests that this Court issue a declaratory judgment indicating that Google may lawfully disclose such information.

Google further requests that the Court hold oral argument on this amended motion and that the argument be open to the public. A public argument would be consistent with this Court's rules, which state that "a hearing in a *non-adversarial* matter must be *ex parte* and conducted within the Court's secure facility," suggesting, by negative implication, that a hearing in an adversarial matter shall be open. FISC Rule 17(b) (emphasis added). It is also required by the First Amendment, which generally protects a right of public access to judicial proceedings. *See, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

Pursuant to FISC Rule of Procedure 7(i), Google certifies that the following responsible employees for relevant matters hold security clearances: John Kent Walker Jr., General Counsel (FBI-Secret), and Richard Paul Salgado, Legal Director (FBI-Top Secret). These clearances were granted for the purpose of handling classified legal process. Google's undersigned counsel does not hold a security clearance.

Pursuant to FISC Rules of Procedure 7(h)(1) and 63, undersigned counsel for Google certifies he is a member in good standing of the bars of the following federal courts: United States District Court for the Western District of Washington (admitted in 1989), United States Court of Appeals for the Ninth Circuit (admitted in 1990), and United States Supreme Court

(admitted in 1995). Undersigned counsel further certifies he is licensed to practice law by the bar of the District of Columbia (admitted in 1988), and the bar of the State of Washington (admitted in 1989).

DATED: September 9, 2013

Respectfully submitted,

Albert Gidari / by Ike

Albert Gidari
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
206-359-8688
Fax: 206-359-9688
agidari@perkinscoie.com

Attorneys for Google Inc.

CERTIFICATE OF SERVICE

I hereby certify this 9th day of September, 2013, that the foregoing document was served via hand delivery on the following:

Christine Gunning
Litigation Security Group
United States Department of Justice
2 Constitution Square
145 N St., NE, Suite 2W-115
Washington, DC 20530

Albert Gidari / by Jke

Albert Gidari
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101
206-359-8688
Fax: 206-359-9688
agidari@perkinscoie.com

Attorneys for Google Inc.